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Supreme Court, U.S.
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No. 00-1742

In The

Supreme Court of the United States

ABU-ALI ABDUR'RAHMAN,

Petitioner,

vs.

RICKY BELL, Warden,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Did the court of appeals err in reversing the district court's grant of habeas corpus relief on a theory not relied on by the respondent?

2. Did the petitioner demonstrate that his attorney's deficient performance at the sentencing phase of his trial resulted in prejudice?

3. Could the jury instructions at the sentencing phase of petitioner's trial be reasonably understood to require juror unanimity on particular mitigating circumstances in violation of the Eighth Amendment?

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The opinion of the court of appeals (Pet. App. 1a-46a) is published at 226 F.3d 696. The court of appeals' order denying rehearing and rehearing en banc (Pet. App. 156a) is unpublished. The district court's opinion and final judgment granting the writ of habeas corpus and vacating petitioner's death sentence (Pet. App. 47a-98a) are published at 999 F.Supp. 1073.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2000, and petitioner's petition for rehearing with a suggestion for rehearing en banc was denied on December 22, 2000. Justice Stevens extended the time to file a petition for a writ of certiorari up to and including May 21, 2001. The petition was docketed on May 23, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. In the early morning hours of February 18, 1986, Nashville, Tennessee, police discovered the body of Patrick Daniels at his duplex. He had been fatally stabbed. Norma Norman, the other resident, was found alive but with a butcher knife protruding from her back. The home appeared to have been ransacked, and pieces of duct tape were found strewn throughout the kitchen and living room.

On February 16, 1986, petitioner Abu-Ali Abdur'Rahman ("petitioner"), formerly James Lee Jones, had been introduced to Daniels at the duplex and bought a small amount of marijuana from him. Petitioner later told a friend, Harold Devalle Miller, that they should rob Daniels. Miller agreed to assist him, and petitioner concocted a plan whereby petitioner would enter Daniels' duplex under the pretext of making a drug purchase. Miller was then to force his way in and "rob" both Daniels and petitioner with a shotgun supplied by petitioner.

After the plan had to be abandoned when Miller became scared and was unable to carry out his part, petitioner formulated a second plan, to be executed the next evening. He told Miller he intended to stab the occupants of the duplex because shooting them would make too much noise.

On the night of February 17, petitioner armed himself with a shotgun, and Miller armed himself with an unloaded pistol. After obtaining some duct tape, they drove to the duplex. During the trip, petitioner related the specifics of the plan to Miller. Upon gaining entrance to the home under the pretext of purchasing some drugs, petitioner and Miller displayed their firearms and forced Daniels and Norman to lie on the floor. Petitioner bound them with duct tape about the hands, feet, eyes, and mouth. Petitioner then questioned Daniels as to where he kept his cocaine and his money. After stealing Daniels' bank card, petitioner forced Daniels to tell him the access code number to the bank account. Petitioner also searched the house and found some marijuana in the sofa cushions. After telling Daniels that he had been sent from

Chicago to "clean up everything" and that "you ain't been doing right and I'm here to teach you a lesson," petitioner procured a butcher knife from the kitchen and stabbed Daniels six times in the chest. Prior to and during the stabbing, Daniels was crying and begging petitioner not to hurt anyone. After Daniels ceased convulsing and lay motionless, petitioner turned to Norman and stabbed her in the back several times. While petitioner was stabbing Norman, Miller pulled him off and told him they should leave. Leaving the butcher knife sticking in Norman's back, the two men fled. In addition to the bank card and marijuana, the proceeds of the robbery included $300, which Norman testified was found missing from a box in her bedroom.

The following night, petitioner spoke with Miller about the crime and indicated that he could not understand how Norman had survived "after the licks" he had given her. Petitioner further stated that Norman was a strong woman and that "something had to be done about it." He suggested that they blow up the hospital wing where Norman was recuperating.

Petitioner was arrested on February 19. Miller fled the state and was not arrested until March 1987. Norma Norman positively identified petitioner and Miller from a photographic lineup. A search of petitioner's home produced the shotgun used in the commission of the crimes. The police also discovered that one of the tire tracks found at the crime scene was made by a tire from petitioner's vehicle.

In 1987, a Davidson County Criminal Court jury found petitioner guilty of first degree murder, assault

with intent to commit first degree murder with bodily injury, and armed robbery. At the sentencing phase of the trial, the State introduced evidence that petitioner had federal convictions of second degree murder in 1972 and assault with a dangerous weapon (knife) in 1970. Petitioner, who did not testify at the guilt phase, testified at the sentencing phase. He admitted to killing Daniels and stabbing Norman but denied any intent to kill them. He testified that he had become involved in a religious organization that espoused ridding the black community of social ills, particularly drug dealers. He testified that his intent had been to place so much "fear" in Daniels that he would no longer sell drugs. In addition to petitioner's testimony, the defense presented the testimony of petitioner's wife regarding his finances and religious affiliations.

The jury sentenced petitioner to death for first degree murder, finding three aggravating circumstances: the defendant was previously convicted of one or more felonies whose statutory elements involved the use of violence to the person; the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind; and the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, or kidnapping. The trial court sentenced petitioner to two consecutive life terms for the assault with intent to commit first degree murder with bodily injury and for armed robbery. The Tennessee Supreme Court affirmed the judgment, *State v. Jones*, 789 S.W.2d 545 (Tenn. 1990), and this

Court denied a petition for a writ of certiorari. *Jones v. Tennessee*, 498 U.S. 908 (1990).

2. In 1991 petitioner sought post-conviction relief in the state trial court, which conducted a hearing, made findings, and denied relief. The judgment was affirmed in *Jones v. State*, No. 01C01-9402-CR-00079, 1995 WL 75427 (Tenn.Crim.App., Feb. 23, 1995). The Tennessee Supreme Court denied review, and this Court denied a petition for a writ of certiorari. *Jones v. Tennessee*, 516 U.S. 1122 (1996).

3. Petitioner filed this petition for a writ of habeas corpus in 1996, challenging both the convictions and sentences. The district court disposed of most of the claims by summary judgment but, over respondent's objections, conducted an evidentiary hearing on petitioner's claims of prosecutorial misconduct, trial counsel's conflict of interest, and ineffective assistance of trial counsel. On April 8, 1998, the district court denied the writ on petitioner's claims of prosecutorial misconduct, conflict of interest of trial counsel, and ineffective assistance of counsel at the guilt phase of the trial. However, the district court, relying almost exclusively on the evidence adduced at the federal evidentiary hearing, granted the writ and vacated petitioner's death sentence on petitioner's claim of ineffective assistance of counsel at the sentencing phase due to counsel's failure to present mitigating evidence. The district court stayed its judgment pending appeal.

The court of appeals reversed the judgment vacating petitioner's death sentence but affirmed the judgment in all other respects, concluding that petitioner failed to

demonstrate prejudice resulting from trial counsel's performance at the sentencing phase. Bypassing respondent's argument that without the evidence at the federal evidentiary hearing petitioner had failed to demonstrate prejudice, the majority concluded that, "even considering the supplemental evidence heard by the district court and outlined in its opinion, petitioner did not suffer prejudice at the sentencing phase due to his trial counsel's deficient performance." (Pet. App. 20a)

ARGUMENT

1. Petitioner contends that the court of appeals' resolution of the "prejudice" issue on his claim of ineffective assistance of counsel at sentencing is irreconcilable with the principle that a party is deemed to have waived all arguments not expressly raised on appeal. He argues that, because respondent did not expressly brief or argue the point that prejudice was not proven even when the evidence at the federal evidentiary hearing was considered, the court of appeals was barred from relying on that conclusion to resolve the issue. However, petitioner has failed to demonstrate any reasons for granting review on this issue.

a. In the first place, the issue is not squarely presented by this case. The court of appeals recognized (and petitioner does not challenge it here) that "the additional evidence and factual findings made by the district court do not contradict the factual findings made by the post-conviction trial court. (citation omitted) Instead, the additional evidence seems to merely supplement the factual

findings made by the post-conviction trial court." (Pet. App. 20a) Thus, presumably the court of appeals would have reached the same legal conclusion had it relied solely on the state court record. Furthermore, as respondent argued below, the court of appeals should have rested its prejudice analysis exclusively on the state court record because petitioner clearly had failed to show cause for his failure to develop the facts in the state court proceedings and actual prejudice resulting from that failure (or that a fundamental miscarriage of justice would have resulted from the district court's failure to hold an evidentiary hearing). *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 11-12 (1992).

b. Petitioner's argument that the court of appeals' disposition in this case violated an immutable principle of appellate review of the Sixth Circuit is simply incorrect. Prior to the decision in this case, the court of appeals had firmly recognized that the waiver rule was not jurisdictional and that the court, in exceptional cases or to avoid a miscarriage of justice, could choose to entertain arguments not raised by the parties. *Dorris v. Absher*, 179 F.3d 420, 425 (6th Cir. 1999); *Mayhew v. Allsup*, 166 F.3d 821, 823-24 (6th Cir. 1999). The instant case presented just such exception. To permit a district court's judgment vacating a state court's death sentence to stand, where the extant record clearly did not support a finding of prejudice, would have constituted a miscarriage of justice. And, to the extent that the decision below conflicts with Sixth Circuit precedent, such an intra-circuit conflict should be resolved by the Sixth Circuit and not by a grant of certiorari. *See Davis v. United States*, 417 U.S. 333, 340 (1974).

c. Petitioner's argument that there is a conflict among the circuits on this issue is incorrect. While *Demarest v. Price*, 130 F.3d 922 (10th Cir. 1997); *Boardman v. Estelle*, 957 F.2d 1523 (9th Cir. 1992), *cert. denied*, 506 U.S. 904 (1992); *Rivera v. Director, Dep't of Corrections*, 915 F.2d 280 (7th Cir. 1990); and *Wilson v. O'Leary*, 895 F.2d 378 (7th Cir. 1990), all involve application of the waiver principle to bar review of an issue not raised by one of the parties, the cases merely reflect the exercise of the courts' discretion in the particular cases before them. None of the cases can fairly be read to stand for the proposition that a court of appeals has no discretion in the matter.

Petitioner's suggestion that *Boyd v. Thompson*, 147 F.3d 1124 (9th Cir. 1998); *Odum v. Boone*, 62 F.3d 327 (10th Cir. 1995); *Esslinger v. Davis*, 44 F.3d 1515 (11th Cir. 1995); and *Lugo v. Keane*, 15 F.3d 29 (2d Cir. 1994), demonstrate that the court of appeals' decision is inconsistent with notice and an opportunity to be heard is misplaced. In each of those cases, the court addressed action by a district court terminating a petitioner's case *sua sponte* without notice and an opportunity to be heard. Petitioner, however, obviously was on notice that the court of appeals might well take into account the evidence at the federal evidentiary hearing in evaluating "prejudice" at the sentencing phase; the district court had relied on that evidence almost exclusively in concluding that prejudice had been shown.

d. Finally, contrary to petitioner's contention, the court of appeals' decision does not conflict with decisions of this Court. Indeed, in *United States v. Karo*, 468 U.S. 705 (1984), despite concluding that tainted evidence was used

in a search warrant affidavit, the Court, on its own initiative and without briefing by the parties, conducted a review of the record and overturned the suppression of the evidence, concluding that sufficient evidence existed beyond the tainted evidence to sustain the warrant. 468 U.S. at 719-21.

Lankford v. Idaho, 500 U.S. 110 (1991), relied on by petitioner, is clearly distinguishable. In *Lankford*, the Court held that Lankford's due process rights were violated because he did not receive adequate notice that his sentencing hearing could result in the death penalty. The Court's holding rested on the premise that imposing the death penalty when the state did not seek it and the defendant had no notice that it could be imposed compromised the adversarial process essential to the truth-seeking function of a *trial* and, by close analogy, of a *capital sentencing proceeding*. 500 U.S. at 127. Obviously, the court of appeals, in reviewing the propriety of the grant of a writ of habeas corpus, was not performing the function of a trier of fact at a trial or sentencing hearing.

2. Like the state post-conviction trial and appellate courts, the court of appeals concluded that petitioner did not suffer prejudice at the sentencing phase due to his trial counsel's deficient performance:

> While it is true that much of the supplemental evidence contains mitigating evidence that a sentencer might find to be compelling, the same evidence likewise has aspects that would be compelling evidence of aggravating circumstances. In particular, the supplemental evidence contained a description of Petitioner's motive for killing a fellow prison inmate and a

> history of violent character traits. Therefore, we agree with the post-conviction trial court and the Tennessee Court of Criminal Appeals that because the mitigating evidence that could have been introduced also contained harmful information, Petitioner did not suffer prejudice sufficient to create a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating factors did not warrant death.

(Pet. App. 20a) Petitioner asks this Court to review the court of appeals' determination. However, petitioner has failed to demonstrate compelling reasons warranting review.

a. First, petitioner asserts that the court of appeals' decision conflicts with precedents from four other circuits. (Pet. 14-17) But the cases relied on fail to show any such conflicts. None of the cases can fairly be read for the proposition that, as a matter of law, prejudice from counsel's deficient performance is shown whenever counsel fails to investigate and offer evidence of mitigating circumstances – even when that evidence contains information likely to harm the defense. On the contrary, the conclusion in each case that prejudice was demonstrated simply rests on the application of the pertinent legal standard to the particular facts of the case. *Emerson v. Gramley*, 91 F.3d 898, 907 (7th Cir. 1996) ("We conclude that, in the unique circumstances of this case, [the attorney's] subminimum representation of [the petitioner] at the sentencing hearing may have been responsible for the death sentence . . . "); *Harris v. Dugger*, 874 F.2d 756, 764 (11th Cir. 1989) ("[O]n this record, we cannot conclude

that effective counsel would have made a strategic decision to forego testimony about [petitioner's] good character merely because its use would have permitted the state to add some prior unlawful acts to the proof already in the case"); *Lockett v. Anderson*, 230 F.3d 695, 716 (5th Cir. 2000) ("We just cannot say with any degree of confidence that an objectively reasonable juror, confronted with this mitigating evidence, might not have reached the conclusion that [petitioner] lacked the requisite level of culpability to be punished with death"); *Pickens v. Lockhart*, 714 F.2d 1455, 1468 (8th Cir. 1983) ("We find that [petitioner] was actually and substantially prejudiced in the penalty phase of the case").

Nothing suggests that the court of appeals' decision in this case was inconsistent with the decisions of the Seventh, Fifth, Eleventh, and Eighth Circuits in those cases. Applying the correct legal standard of *Strickland v. Washington*, 466 U.S. 668, 695 (1984) ("whether there is a reasonable probability that, absent the error, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death"), to the facts of this case, the court of appeals simply concluded that petitioner did not suffer prejudice.

b. Petitioner contends that, contrary to *Williams v. Taylor*, 529 U.S. 362 (2000), the court of appeals applied the wrong standard in analyzing prejudice. (Pet. 17-20) However, in this regard petitioner has misread both *Williams* and the court of appeals' opinion.

Petitioner assumes that *Williams* created a new standard for analyzing prejudice in federal habeas corpus

proceedings: "whether the 'totality of the available mitigation evidence' would 'have influenced the jury's appraisal of [the defendant's] moral culpability.' " (Pet. 17-18) But a plain reading of *Williams* demonstrates that the Court did not supplant the *Strickland* standard, but reaffirmed it. *Williams*, 529 U.S. at 391 ("To establish prejudice he 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' ") (quoting *Strickland*, 466 U.S. at 694).

Furthermore, in *Williams* this Court determined that the Virginia Supreme Court's decision – that the petitioner suffered no prejudice from counsel's failure to present mitigating evidence at sentencing – was "an unreasonable application" of federal law under 28 U.S.C. § 2254(d)(1) because, *inter alia*, the *state court* had "failed to evaluate the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the [state] habeas proceeding – in reweighing it against the evidence in aggravation." *Williams*, 529 U.S. at 397-98 (emphasis added). Clearly, the language in *Williams* seized upon by petitioner pertains only to the reweighing of aggravating and mitigating circumstances by a state court – not the prejudice analysis performed by the court of appeals on collateral review in this case. Indeed, it would have been inappropriate for the court of appeals to have "reweighed" aggravating and mitigating circumstances. *See Coe v. Bell*, 161 F.3d 320, 334 (6th Cir. 1998), *cert. denied*, 528 U.S. 842 (1999) (reweighing "hardly appropriate in the course of collateral review by a federal

court"). Therefore, *Williams* does not support petitioner's argument that the court of appeals incorrectly applied *Strickland*'s prejudice prong.

In any event, it is abundantly clear that the court of appeals considered all of the available mitigation evidence in determining whether petitioner was prejudiced by counsel's deficient performance. After concluding that petitioner did not suffer prejudice, the opinion plainly states: "We reach this conclusion *even considering the evidence presented at the evidentiary hearing below.*" (Pet. App. 19a) (emphasis added). In the succeeding paragraph, the opinion reiterates the point: "*Even considering the supplemental evidence heard by the district court and outlined in its opinion,* petitioner did not suffer prejudice at the sentencing phase due to his trial counsel's deficient performance." (Pet. App. 20a) (emphasis added). The court of appeals neither misapplied *Williams* nor evaluated the mitigating evidence improperly.

c. Petitioner mistakenly contends that the court of appeals' prejudice analysis was flawed because, in evaluating the likely effect of counsel's deficient performance upon the balance of aggravating and mitigating circumstances, the panel majority included the "heinous, atrocious or cruel" aggravating circumstance, the jury instructions for which it found unconstitutionally vague. (Pet. 20-22) In the first place, the panel majority did not find the jury instruction on the "heinous, atrocious or cruel" aggravator unconstitutionally vague. The court specifically declined to pass on the constitutional question because it found any error in the instruction harmless. (Pet. App. 22a-24a)

Second, petitioner proceeds on the erroneous premise that the instruction ("the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind") was unconstitutionally vague. *See Maynard v. Cartwright*, 486 U.S. 356, 364-65 (1988) (aggravating circumstance of "especially heinous, atrocious or cruel" passes constitutional muster when it applies to murder involving "some kind of torture or serious abuse"). Furthermore, even assuming that the instruction was infirm, the Tennessee Supreme Court cured the error by applying a narrowing construction of the aggravating circumstance. *See Godfrey v. Georgia*, 466 U.S. 420, 431-32 (1980) (narrowing construction by state supreme court would have cured vagueness of aggravator). By finding that the evidence was sufficient to support the "heinous, atrocious or cruel" aggravator, *State v. Jones*, 789 S.W.2d 545, 550 (Tenn. 1990), the state court presumably applied its narrowing construction previously adopted in *State v. Williams*, 690 S.W.2d 517, 529-30 (1985) (defining "torture" as "the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious" and providing examples of acts evincing "depravity of mind"). *See Arave v. Creech*, 507 U.S. 463, 471 (1993) (presumption that state court knew and applied existing narrowing construction).

In any event, nothing in the panel majority's opinion suggests that the majority in fact included the "heinous, atrocious or cruel" aggravator in its prejudice analysis. The court merely concluded that petitioner did not suffer prejudice sufficient to create a reasonable probability that

the sentencing jury would have concluded that "the balance of aggravating and mitigating factors" did not warrant death. (Pet. App. 19a, 20a) Judge Batchelder concurred in Judge Siler's opinion for the court. (Pet. App. 31a) The fact that, in the course of her concurring opinion, there is included a quote from the state trial court's opinion referring to the effect of *three* aggravating circumstances is of no legal consequence.

d. Petitioner contends that the court of appeals' decision is inconsistent with *Williams* because the court below characterized the evidence of petitioner's prior violent criminal behavior as "harmful." (Pet. 22-24) Seizing upon language in *Williams* characterizing the evidence of Williams' prior criminal history as "consistent with the view that in each case his violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation," 529 U.S. at 398, petitioner leaps to the illogical conclusion that *Williams* requires courts to view prior violent criminal behavior as "mitigating" in all cases. But *Williams* did not create such a per se rule. Rather, this Court merely observed that in Williams' case his criminal history could have been viewed by the sentencing jury in that light.

Williams does not preclude a court from taking into account the obvious harmful effects of a petitioner's criminal history in analyzing prejudice from counsel's failure to introduce such evidence, but only from failing to evaluate "the totality of the available mitigation evidence." 529 U.S. at 396-97. And, as discussed above, nothing in the court of appeals' decision in this case suggests that the court failed to view the mitigation evidence in its "totality."

Petitioner's assertions that the evidence of his violent criminal history was inadmissible and cumulative are incorrect. Both the state courts and the district court implicitly recognized that the introduction of petitioner's records would have opened the door for the prosecution to introduce the criminal history evidence at the penalty phase.[1] (Pet. App. 18a-19a (quoting Court of Criminal Appeals), 95a-96a) The "harmful evidence" to which the state courts referred included, *inter alia*, evidence that petitioner suffered only from a personality disorder rather than a mental illness; that he was convicted of assault at age of 15 and two more assaults at the age of 19; that while in prison he received numerous citations for misconduct, including possession of a knife; that he threatened his junior high school teachers with a knife; and that he was discharged from the military under less than honorable conditions. (Pet. App. 95a-96a) This evidence would have been more than cumulative of the fact of the convictions introduced by the State to prove the prior violent felony aggravating circumstance.

e. Petitioner contends that in analyzing prejudice the court of appeals failed to account for the ability of a single juror to impose a life sentence. (Pet. 24-25) However, contrary to petitioner's contention, this case does not squarely present the issue. The court of appeals did

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[1] Petitioner's reliance on *Carter v. Bell*, 218 F.3d 581, 589 (6th Cir. 2000), is misplaced. In *Carter*, the court of appeals determined that the evidence of Carter's criminal background and violent history would not have been relevant to explain or controvert the particular mitigating factors in Carter's case. But here the state courts found that the negative evidence could have been introduced.

not specifically address the potential effect of the omitted evidence upon a single juror, and nothing in the opinion below suggests that the court either adopted or rejected petitioner's argument here that prejudice can be established if one hypothetical juror might have been swayed by a piece of mitigating evidence.

f. Finally, petitioner contends that in analyzing prejudice the court of appeals failed to account for counsel's failure to introduce *any* mitigating evidence. (Pet. 25-26) But petitioner's argument is based on an assertion of fact not supported by the record. The sentencing jury heard two witnesses for the defense, petitioner and his wife. Petitioner testified concerning his relationship with a religious organization and his account of events surrounding the stabbings. (Pet. App. 94a) In addition, petitioner did not deny responsibility for the homicide and assault but endeavored to mitigate the circumstances of the offenses by testifying that he suffered from a memory lapse, *State v. Jones*, 789 S.W.2d at 552, and by making a plea for his life. (Pet. App. 94a) Petitioner's wife testified regarding their finances. (*Id.*)

While this strategy ultimately proved unsuccessful, the record does not support petitioner's assertion that counsel wholly failed to introduce any mitigating evidence. Thus, contrary to petitioner's argument, this case does not squarely present the prejudice issue where the jury was provided with no reasons to spare petitioner's life.

3.a. Petitioner contends that a reasonable juror could have read the jury instructions at the sentencing phase of his trial as requiring a unanimous finding of

mitigating circumstances in violation of *Mills v. Maryland*, 486 U.S. 356 (1988). In *Mills*, the relevant portion of the jury verdict form read as follows:

> Based upon the evidence we unanimously find that each of the following mitigating circumstances which is marked "yes" has been proven to exist by a preponderance of the evidence and each mitigating circumstance marked "no" has not been proven by a preponderance of the evidence.

486 U.S. at 387 (emphasis omitted). This Court held that these sentencing instructions were constitutionally invalid because they created a substantial likelihood that reasonable jurors might think that they were precluded from considering any mitigating evidence in the absence of unanimity. 486 U.S. at 384.

But, as the court of appeals correctly determined, petitioner's jury instructions contained no such infirmity. Petitioner's sentencing jury was instructed, in pertinent part:

> Our statutory law provides that the jury shall fix punishment after a separate sentencing hearing, to determine whether the defendant shall be sentenced to death or life imprisonment. Your verdict must be unanimous as to either form of punishment.
>
> * * *
>
> No death penalty shall be imposed unless you unanimously find that the State during the trial, and/or during the sentencing hearing, has proven beyond a reasonable doubt one or more of the following specific statutory aggravating circumstances:

* * *

In arriving at the punishment, the jury shall consider, as heretofore indicated any mitigating circumstances which shall include, but not be limited to the following:

* * *

If the jury unanimously determines that at least one statutory aggravating circumstance or several statutory aggravating circumstances have been proven by the State beyond a reasonable doubt, and that the aggravating circumstance or circumstances outweigh any mitigating circumstances, the sentence shall be death.

* * *

The jury must include and reduce to writing the specific statutory aggravating circumstance or circumstances so found. Further, the jury must include in its finding that the statutory aggravating circumstance or circumstances so found outweigh any mitigating circumstances. Upon such unanimous finding, each member of the jury shall affix his or her signature to the said written finding, and then return said written verdict to the Court.

If the jury unanimously determines that no statutory aggravating circumstance or circumstances have been proven by the State beyond a reasonable doubt; or if the jury unanimously determines that the statutory aggravating circumstance or circumstances have been proved by the State beyond a reasonable doubt, but that the said circumstance or circumstances do not outweigh any mitigating circumstances, the punishment shall be life imprisonment.

* * *

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

(Pet. App. 152a-153a) (emphasis omitted). These instructions require unanimity as to the results of the *weighing* of aggravating and mitigating circumstances, but that is a far different matter than requiring unanimity as to the *presence* of a mitigating circumstance.

The legal standard for reviewing jury instructions claimed to restrict consideration of mitigating circumstances is "whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U.S. 370, 380 (1990) (emphasis added). "A capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a *possibility* of such an inhibition." *Id.* (emphasis added). Petitioner cannot demonstrate a "reasonable likelihood" that the instructions at sentencing were unconstitutionally applied in violation of *Mills*; the actual language of the instructions simply will not permit it. In order to sustain petitioner's claim, one would have to assume that the jurors ignored the text of the instructions and superimposed a unanimity requirement for particular circumstances – a requirement conspicuously absent from the instructions actually given. But "[t]he 'rule' – indeed, the premise, upon which the system of jury trials functions under the American judicial system – is that juries can be trusted to follow the trial court's instructions." *Parker v. Randolph*, 442 U.S. 62, 75 n.7 (1979). "The

Court presumes that jurors, conscious of the gravity of their task, attend closely to the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given." *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985).

b. Petitioner's reliance on *Frey v. Fulcomer*, 132 F.3d 916 (3d Cir. 1997), *cert. denied*, 524 U.S. 911 (1998), and *Kubat v. Theriet*, 867 F.2d 351 (7th Cir. 1989), *cert. denied sub nom. Kubat v. Greer*, 493 U.S. 874 (1989), to demonstrate a conflict among the federal circuits is misplaced. In *Frey*, the jury was told in part: " . . . the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance and no mitigating circumstances, or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances," suggesting the need for jury unanimity as to both its ultimate and interim conclusions. 132 F.3d at 922-23. In *Kubat*, the jury was told in part: "If . . . you unanimously conclude that there is a sufficiently mitigating factor or factors to preclude imposition of the death sentence, you should sign the form which so indicates," clearly suggesting that a particular mitigating factor required unanimity. 867 F.3d at 369. In both cases the sentencing jury could have reasonably understood its instructions to require unanimity in consideration of mitigating evidence. That is not so in petitioner's case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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